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No. 01-521

In The
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

KELLY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petitioners' Reply Brief

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Introduction

This case is about the integrity of the selection process of candidates for elective public office. It is about the ability of candidates to effectively communicate information to voters that the voters need in order to vote in an informed manner. It is about restrictions that muzzle and muffle the free speech and free association rights of candidates for elective office – restrictions that are thus presumptively suspect under the Constitution and automatically subject to the strictest scrutiny because they impinge on values at its very heart.

The challenged provisions of Canon 5 of the Minnesota Code of Judicial Conduct would certainly be unconstitutional if applied to candidates for any legislative or executive office. Respondents in effect argue, however, that because the Petitioners are candidates for *judicial* office, any presumption of unconstitutionality is dispelled, scrutiny is relaxed, and a vaunted interest in protecting judicial independence trumps virtually any First or Fourteenth Amendment right the Petitioners raise against the Canon. *See, e.g.*, Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Resp't Br.") at 8-10. In effect, Respondents wrongly seek to transform a case about the integrity of the selection process for candidates for public office into a case about judicial independence.

Like most states, Minnesota has established an elected judiciary. The law-making functions of its common law courts render them similar in this respect to the legislature, and thus properly subject to the direct elective process. The people of Minnesota choose direct voter accountability as a check upon possible judicial abuse in preference to an appointive system.

Minnesota *wants* judicial candidates to campaign; it *wants* to know their views on legal and political matters; it *wants* them to speak out and to seek the approval of voters based on what they say. In an elective judicial system, what-

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ever an interest in judicial independence might entail, it certainly does not include insulating judicial candidates from the rigors of a campaign for public office or from direct accountability to the electorate, as the challenged provisions of Canon 5 seek to do. In an elective judicial system, "judicial independence" cannot and does not mean subversion of the integrity of the elective selection process.

A constitutionally required campaign for judicial office makes no sense unless judicial candidates can effectively communicate their messages to the voting public – including, perhaps especially, the voting public as it organizes itself into political parties. From this perspective, the challenged provisions of Canon 5 serve no legitimate state interest recognized by the Minnesota Constitution insofar as they effectively prevent judicial candidates from doing exactly what the Minnesota Constitution requires them to do: campaign and campaign effectively if they are to achieve public office.

Petitioners do not deny the existence of a significant interest in maintaining judicial neutrality in decisionmaking. But the challenged provisions of Canon 5 are unnecessary to maintenance of judicial decisionmaking neutrality, which is protected by unchallenged provisions of the Canon – such as Canon 5(3)(d)(i), App. 133a, which forbids judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Striking the challenged provisions is necessary, however, to maintain the integrity of the popular election process in which all Minnesota judges must engage in order to achieve judicial office.

I. Petitioners Suffer Injuries-In-Fact Because of The Challenged Provisions of Canon 5.

Respondents suggest that Petitioners have not or do not continue to suffer injuries caused by Canon 5. Resp't Br. at 2-4. They recite the series of events occurring during Petitioner Wersal's 1996 campaign for Associate Justice, apparently in order to imply that he has never been truly threatened with enforcement of the Canons. *See* Resp't Br. at 3-4.

To the contrary, Canon 5's prohibitions on the activities of Petitioner Wersal, his campaign committee, his family, and his friends severely burdened Wersal's ability to campaign and the ability of the Republican Party to endorse Wersal's candidacy, as the record clearly shows. The Canon 5 prohibitions relegated the 1998 and subsequent Republican Party state judicial candidate endorsements to virtual guesswork and denied the Party and its members the opportunity to personally evaluate his credibility as a candidate.[1]

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[1]The record shows that Canon 5 caused Wersal to decline to attend over one hundred Republican meetings leading up to the June 1998 state convention. Wersal Decl. ¶¶ 1-3, 6, 10, 29, at Appendix to Brief of Appellants in Eighth Circuit ("AA") 885-890, 898-899. Wersal's absence at these meetings caused the June 1998 state convention delegates in considering endorsement of Wersal to rely on indirect, secondhand information – opposed to direct, firsthand information from Wersal himself. Cooper Decl. ¶¶ 6-31, at AA 163-169; Maxim Decl. ¶¶ 4-11, at AA 651-652.

In 1998 – as it does every year – the Republican Party sponsored a series of meetings to select its statewide candidates. Copper Decl. ¶ 6, at AA 163. On March 3, 1998, precinct caucuses were held and delegates to state senate district conventions were elected. *Id.* In April of 1998, the state senate district conventions elected delegates to the congressional district and state conventions. *Id.* The eight congressional district conventions were held in May of 1998. *Id.* Finally, the state convention was held in June of 1998. *Id.* At all of these meetings in 1998, Republicans gathered information from statewide candidates and their campaigns – except for Wersal and his campaign – for the purpose of endorsement at the state convention. *Id.* at ¶¶ 7-8, at AA 163-164. Delegates prefer to receive information firsthand from the candidate or the candidate's campaign, rather than secondhand information. *Id.*

Prior to the March 3, 1998, precinct caucuses, the Petitioners moved for a preliminary injunction so that Republicans at the precinct caucuses, state senate district conventions, the congressional district meetings, and the (continued...)

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In addition, Respondents in effect argue that there is no credible threat that Petitioner Wersal will be disciplined by the Minnesota Office of Lawyer Professional Responsibility ("Lawyers Board") for violating the "announce" clause of Canon 5A(d)(i), App. 134a (prohibiting a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues").[2] Resp't Br. at 2, 4. But in 1996, Wersal was in fact subjected to disciplinary proceedings by the Lawyers Board as the result of the clause, as Respondents themselves recount. *Id.* at 3. The Board's present representations that it will not enforce the announce clause depend

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[1](...continued)
state convention could meet and receive information from Wersal. *Id.* ¶¶ 10-21, at AA 164-167. The U.S. District Court refused to enjoin enforcement of Canon 5 prior to the precinct caucuses. *Id.* at ¶ 10, at AA 164. The Eighth Circuit and Eighth Circuit Justice, in turn, prior to the June 1998 state convention, denied similar applications for injunctive relief. *Id.* at ¶¶ 12, 15, 17, and 21, at AA 165-167.

Refused preliminary injunctive relief, Wersal consequently did not attend the March 3, 1998, precinct caucuses, the April 1998 state senate district conventions, the May 1998 congressional district conventions, or the June 1998 state convention. Wersal Decl. ¶¶ 1-3, 6, 10, 29, at AA 885-890, 898-899. Republicans at these events were thus denied the opportunity to meet Wersal who would have been there and given them firsthand information as to his views and permitted the Republicans personally evaluate him. Clayton Decl. ¶ 34, at AA 49; Cooper Decl. ¶ 32, at AA 169-170.

At the June 1998 state convention, Republicans considered the endorsement of Petitioner Wersal for Associate Justice without firsthand knowledge of the candidate. Canon 5 rendered the endorsement process a matter of virtual guesswork based on second-hand information. Maxim Decl. ¶¶ 4-11, at AA 651-652.

[2]Respondents have also erroneously asserted that "[t]he Lawyers Board has never threatened any investigation or action against Wersal for violations of Canon 5." Resp't Br. at 4. The Lawyers Board, based on a complaint filed by the Judicial Board in 2000, has been investigating Wersal for alleged campaign-related misconduct under Canon 5 since December of 2000. Respondents have corrected their statement in this regard in correspondence to this Court dated October 30, 2001.

entirely on whether it is ultimately deemed constitutional – and a declaration that the clause is constitutional is the very outcome that it seeks in this case.

Finally, even if the Lawyers Board will not discipline Wersal under the "announce" clause, the Minnesota Board on Judicial Standards ("Judicial Board") would if he were elected. Petitioner Wersal has run for judicial office in the past and seeks to continue to do so in the future. Regardless of the Lawyers Board's intentions, Wersal's candidacy remains threatened by the very fact that its success would render him subject to the discipline of the Judicial Board if he is seen to violate Canon 5.

II. The Eighth Circuit's Decision Upholding the "Announce" Clause Conflicts With The Seventh Circuit and Decisions of this Court.

The "announce" cause of Canon 5A(d)(i), App. 134a, provides that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." The Eighth Circuit upheld the clause, "[a]s construed by the district court," to prohibit "candidates only from publicly making known how they would decide issues likely to come before them as judges." App. 53a.

Respondents claim that Petitioners may not challenge the district court's construction of the clause because they did not contest it in their opening brief on appeal. Resp't Br. at 12. They also claim there is no conflict between the holding of the Eighth Circuit here and the Seventh Circuit in *Buckley v. Illinois*, 997 F.2d 224, 225 (7th Cir. 1993). *Id.* at 13-14. Respondents misapprehend the nature of the Petitioners' complaint against the announce clause, whether in its plain language or as construed by the district court. In either case, the announce clause is unconstitutionally overbroad. In

either case, the Eighth Circuit's decision conflicts with the precedents of this Court and with the Seventh Circuit in *Buckley*.

First, a construction of the plain language of the announce clause to prohibit discussion of a judicial candidate's views on matters "likely" to come before the candidate if elected simply does not cure the overbreadth problem – the very problem that has led every court that has ruled on the same plain language to hold it unconstitutional. Petitioner Wersal was a candidate for Associate Justice on the Minnesota Supreme Court. How would he be able to judge what sort of legal or political issues are "likely" or "unlikely" to come before him? As the *Buckley* court observed, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal of general jurisdiction." 997 F.3d at 229. As Judge Beam observed in dissent, the narrowing construction is thus "meaningless." App. 76a. And even if the category suggested by the district court's construction "could be properly cabined, it would still roam far beyond the narrow category of speech left unprotected by the [U.S. Supreme] Court in *Brown [v. Hartlage*, 456 U.S. 45, 53, 71 (1982)]." App. 77a. The "announce" clause is unconstitutional under this Court's precedents. The district court's construction does not save it.

Second, whether or not the clause is construed as the district court suggested, the conflict with *Buckley* is not relieved. The point of the decision in *Buckley* is that the announce clause is unconstitutional even as construed as the district courts both in this case and in *Buckley* identically suggested. 997 F.3d at 229. In contrast and in conflict, the Eighth Circuit here plainly upheld the identical announce clause as construed by the district court. That the Illinois announce clause might have been applied unconstitutionally because a judge had been held to violate it by commenting

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truthfully on his record does not distinguish *Buckley*, as Respondents argue. Resp't Br. at 13-14. No Minnesota state court is bound by the federal court construction of the announce clause. Moreover, the Minnesota announce clause as construed by the district court could be applied in the same way as the plain language of the Illinois clause since any issue already a subject of a judge's record is surely "likely" to come before the judge again, if any issue is.

III. The Eighth Circuit's Decision Upholding Canon 5's Burdens on Candidate Speech and Association and On Political Party Endorsements Conflicts With Decisions of the Ninth Circuit and This Court.

Respondents claim that Canon 5's severe restrictions on free speech and association only have an "indirect" impact on political parties and that the nature of the impact is not established in the record. Resp't Br. at 17. Hence, they claim that Canon 5's restrictions on seeking political party endorsements cannot be equated with the ban on party endorsements held unconstitutional in *Eu v. San Francisco County Dem. Cent. Comm.*, 489 U.S. 214 (1989). But the impact of Canon 5's restrictions are clearly evident in the record. *See* this Brief at 1-4. Moreover, although the Canon does not absolutely ban party endorsements, it so severely hamstrings the candidate and those associated with him that any endorsement made will be essentially in the dark. The party is placed in the preposterous situation of endorsing a candidate that cannot speak or attend its meetings and cannot accept or use the endorsement even if it is given. It makes no sense to recognize a ringing constitutional right of political parties to endorse candidates, as this Court did in *Eu*, yet allow that the State may insist that the endorsement cannot be used by the candidate and that the candidate cannot even be personally assessed at party gatherings. Canon 5 in effect imposes a ban

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on *informed* and *useful* endorsements, which is an effective ban on endorsements themselves.

Respondents' attempt to deny a practical conflict with the Ninth Circuit is similarly tortured. Resp't Br. at 21. It is true that the en banc Ninth Circuit decision holding unconstitutional bans on political party endorsements in non-partisan elections, including judicial elections, was later vacated by this Court, although on purely jurisdictional grounds. *See Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub. nom., Renne v. Geary*, 501 U.S. 12 (1991). However, its substantial holding is obviously followed in the Ninth Circuit, as the holding in *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996), bears witness. Although *Renne* may not be technically binding in the Ninth Circuit, it is as a practical matter, and there is certainly now a very real conflict in circuits for the purpose of invoking the attention of this Court's jurisdiction.

Respondents also claim that *Renne* and *Lundgren* draw a distinction between restrictions on "partisan political activities" of candidates and political party endorsements. Resp't Br. at 21. They then seek to characterize the challenged bans on candidates speaking at or attending political party gatherings and seeking, accepting or using political party endorsements as restrictions on "partisan political activities" of judicial candidates.

But the challenged provisions of Canon 5 have nothing to do with whether judicial candidates can or should act as militant advocates or supporters of political parties. Petitioner Wersal does not propose to organize, raise funds, or tub-thump for the Republican Party or its candidates. Such activities are separately and adequately regulated elsewhere in unchallenged provisions of Canon 5. *See, e.g.*, Canon 5A(1)(a), (b), (c), and (e) at App. 132a. Wersal seeks only to speak to party gatherings in order to promote his candidacy

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and to secure and use the Party's endorsement. It is one thing to ban federally employed postal workers from being precinct captains or party fund-raisers. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). It is quite another thing to forbid a candidate for elective office to attend or speak at party gatherings or to strive to secure the official approval of the party.

The particular injustice imposed by the challenged provisions of Canon 5 is highlighted by the fact that they prohibit only speaking and attending the gatherings of and seeking the endorsement of political *parties*, while they pose no such ban for any other organization, political or otherwise. Respondents seek to justify this discrimination and to escape the clear holdings of this Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Carey v. Brown*, 477 U.S. 455 (1992), by asserting that these cases bar only "arbitrary" forms of discrimination in speech. Resp't Br. at 22. They then claim that the distinction between political parties and all other organizations is rational and defensible because of the supposed special dangers of corruption posed when candidates hobnob with parties because they are large, rich, organized, and can hold a candidate in a thrall. Resp't Br. at 22-23.

On such a basis, the State might legitimately ban candidates from interacting with or receiving the public endorsements of gatherings of the rich and famous or the poor and many. In fact, there is "no reason to see . . . [political party] activities as more likely to serve or be seen as instruments of corruption than [activities] by anyone else." *Federal Election Commission v. Colorado Republican Federal Election Committee*, 11 S. Ct. 2351, 2352 (2001).

Finally, Respondents seek to distinguish *R.A.V.* and *Carey* on grounds that the challenged regulations in those cases discriminated on the basis of content of speech, while the contented provisions of Canon 5 ban *all* speech at politi-

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cal party gatherings, while permitting it elsewhere. Resp't Br. at 27-28. But it is impossible to see why banning certain speech to all listeners is more constitutionally offensive than banning all speech to certain listeners. The First Amendment protects the rights of listeners as much as speakers. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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